

Chapter XIII

PUBLIC DISCLOSURE

A. Overview of Function

In addition to removing incompetent, negligent, dishonest, and impaired physicians from the marketplace through its enforcement program, another way in which MBC implements its “paramount” public protection priority²⁵² is by disclosing licensee information to the public, to enable consumers to make informed choices when selecting a health care practitioner.

The Board’s public disclosure policy is an important complement to its enforcement program. The preceding chapters have described many limitations on the Board’s ability to protect the public through its enforcement program — including limitations that are within its control (for example, lengthy delays due in part to its failure to demand compliance with medical records procurement laws) and others that are beyond its control (for example, its limited resources, the recent staffing losses at both MBC and HQE, and the failure of many of its most important sources of information to report physician misconduct as required by law). As a result of these flaws, it is unreasonable to expect that MBC will be able to promptly remove all dangerous physicians from the marketplace. Even assuming these flaws are resolved, consumers are still entitled to information about the people to whom they are entrusting their lives and health. It is thus reasonable to expect MBC, as a complement to its enforcement program, to provide consumers with true, accurate, and complete information about its licensees so they can make informed choices and protect themselves from physicians with whom they would prefer not to deal.

Further, and as astutely noted by the Joint Legislative Sunset Review Committee in 2002, “poor public disclosure is worse than no public disclosure.” In its final report and recommendations on MBC’s 2001–02 sunset review, the JLSRC stated: “A public program of disclosure that purports to provide information a patient might find relevant about the history and record of a physician, but which for whatever reason falls short, is worse than no disclosure program at all. An inadequate program leads a diligent patient into erroneously believing that their physician was trouble-free,

²⁵² Bus. & Prof. Code §§ 2001.1, 2229(a) and (c).

when the physician may in fact have an extensive record of problems. An inadequate program of public disclosure leads a patient into an incorrect belief that no further investigation of their physician is warranted.”²⁵³

In the *Initial Report*, the Monitor described the gradual evolution of MBC’s public disclosure policy over the past twelve years, and noted that the policy is currently embodied in Business and Professions Code sections 803.1 and 2027, and in section 1354.5 of Title 16 of the California Code of Regulations. The very complex confluence of these laws creates four categories of “information” on physicians and three ways to obtain some (but not all) of it:

■ **“Public information” that is specifically described in sections 803.1 and 2027 and required to be posted on MBC’s Web site** — this includes information on the status of a license (whether it is in good standing or subject to an ISO, TRO, or any of the enforcement actions set forth in section 803.1), prior disciplinary actions, “current” accusations,²⁵⁴ some felony convictions known to the Board, any civil malpractice judgment or arbitration award and a limited number of civil malpractice settlements (described in more detail below), some hospital disciplinary actions, and other information required to be posted.²⁵⁵ Under section 2027(b), MBC’s disclosure of much of this information may be posted for only ten years from the date of the event and then must be purged from the Web site.

■ **“Public information” that is disclosed by MBC but is not available on its Web site** (because it is not listed in sections 803.1 or 2027, but is nevertheless public information under the California Public Records Act and must be disclosed upon request) — this includes events that are otherwise-disclosable but are more than ten years old,²⁵⁶ MBC disciplinary actions taken before

²⁵³ Joint Legislative Sunset Review Committee, *Final Recommendations of the Joint Legislative Sunset Review Committee on the Medical Board of California* (May 2002) at 4.

²⁵⁴ Under Business and Professions Code section 2027(a)(4), a “current” accusation is one that has not been dismissed, withdrawn, or settled, and has not been finally decided upon by an ALJ and MBC (unless an appeal of that decision is pending).

²⁵⁵ Business and Professions Code subsections 803.1(b)(3) and (b)(4) require MBC to post approved specialty board certification and approved postgraduate training, respectively. These subsections were added by SB 1950 (Figueroa) in 2002. However, DCA maintains MBC’s Web site, and DCA does not have the resources to add these fields and data to MBC’s Web site at this time. MBC has petitioned to take over maintenance of its Web site, at which time it will add the fields and post approved specialty board certification and postgraduate training.

²⁵⁶ Under Business and Professions Code section 2027(b), only felony convictions and permanent revocations of hospital privileges may be posted indefinitely; all other items of information required to be posted on MBC’s Web site must be purged after ten years.

1990,²⁵⁷ and filed accusations that have been withdrawn, dismissed, settled, or are no longer “current” under section 2027(a)(4).²⁵⁸

■ **“Public information” that is known to MBC but is not disclosed at all** — including criminal arrests, misdemeanor criminal convictions (see Chapter XIII.B.3. below for further discussion), civil malpractice filings, and civil malpractice settlements that do not qualify for disclosure under section 803.1(b)(2) (discussed in greater detail in Chapter XIII.B.2. below).

■ **“Non-public information” known to MBC that is not disclosed** — this includes complaints, pending investigations, and hospital disciplinary actions that did not result in termination or revocation of a physician’s hospital privileges.

B. The Monitor’s Findings and MBC/Legislative Responses

The following summarizes the Monitor’s *Initial Report* findings and concerns about MBC’s public disclosure policy, and documents the responses to those findings implemented by the Medical Board and the Legislature during 2005. More detail on each of the findings is available in Chapter XIII of the *Initial Report*.²⁵⁹

1. The fragmented tangle of overlapping statutes — including drafting errors and inconsistencies — frustrates the purpose of MBC’s Web site, unnecessarily exposes MBC to litigation, and results in the disclosure of different information depending on the mode of inquiry.

In the *Initial Report*, the Monitor found that the purpose of MBC’s Web site — to provide the public with easy access to public information about California physicians — has been frustrated by the language of the statutes. Consumers who check MBC’s Web site will be given only information specifically authorized by sections 2027 and 803.1. Consumers who call the Board’s Central File Room or submit a Public Records Act request will be given a different set of information. And consumers who consult their county courthouses — or perhaps many of them in large communities such as Los Angeles and the Bay Area — may receive even more information. Although most of this information is technically “public information,” is known to the Medical Board, and could easily be loaded onto its Web site, the complexities of the statutes and the

²⁵⁷ MBC began to use its current computer system in 1990, and actions taken before that date and recorded on the Board’s prior system could not be “imported” onto its Web site.

²⁵⁸ See *supra* note 254.

²⁵⁹ *Initial Report*, *supra* note 13, at 212–23.

understandable unwillingness of MBC to expose itself to more expensive litigation²⁶⁰ over its public disclosure policy mean that disclosure varies based on how (and who) the consumer asks for information. The Monitor outlined several specific inconsistencies and apparent drafting errors in these statutes and, in Recommendation #48, suggested that sections 2027 and 803.1 be consolidated and harmonized to achieve the laudable purposes behind MBC's public disclosure statutes.

SB 231 corrects a drafting error that became the subject of *Szold v. Medical Board of California*.²⁶¹ Prior to SB 231, section 2027(a)(2) authorized MBC to post “prior discipline . . . by the board of another state or jurisdiction,” suggesting that MBC was not permitted to post its own prior disciplinary actions. In *Szold*, the Fourth District Court of Appeal examined the legislative history of the bill that added section 2027(a)(2) to the Business and Professions Code, and determined that the legislature intended to permit MBC to disclose “prior discipline . . . by the board or another state or jurisdiction.” Section 11 of SB 231 corrects section 2027(a)(2) to conform to the court's decision in *Szold*.

Section 10 of SB 231 also addresses the public disclosure issue more generally by adding new section 2026 to the Business and Professions Code. Section 2026 requires the Little Hoover Commission, an independent and respected watchdog agency, to “study and make recommendations on the role of public disclosure in the public protection mandate of the board. This study shall include, but not be limited to, whether the public is adequately informed about physician misconduct by the current laws and regulations providing for disclosure.” Section 2026 requires the study to be completed by July 1, 2008.

2. SB 1950's civil settlement disclosure provision has had minimal effect.

Prompted by a number of high-profile California cases and precedent in ten other states, Business and Professions Code section 803.1(b)(2)(A) — added by SB 1950 (Figueroa) in 2002 — authorized MBC to disclose multiple civil malpractice settlements over \$30,000 for the first time. However, MBC's disclosure of malpractice settlements is limited by the following formula:

(1) MBC must classify medical specialties as “high risk” or “low risk,” and may disclose the civil settlements of a physician in a “low risk” specialty only if the physician has three or more settlements in the past ten years. MBC may disclose the civil settlements of a physician in a “high risk” specialty only if the physician has four or more settlements in the past ten years.²⁶² The Board

²⁶⁰ MBC has had to defend its public disclosure policy in a number of lawsuits. See *Initial Report, supra* note 13, at note 329.

²⁶¹ 127 Cal. App. 4th 591 (2005).

²⁶² MBC has identified neurological surgery, orthopedic surgery, obstetrics, and plastic surgery as “high risk” specialties. 16 CAL. CODE REGS. § 1355.31.

may disclose only settlements occurring and reported to the Board after SB 1950's effective date — January 1, 2003.

(2) When it discloses civil malpractice settlements, the Board is not permitted to disclose the actual dollar amount of a settlement. Instead, the Board must calculate (1) the number of physicians practicing in every given specialty; (2) the number of malpractice settlements suffered by all physicians practicing in every given specialty over the past ten years; and (3) the average amount of malpractice settlements suffered by all physicians in every given specialty over the past ten years. When it discloses the settlements of a particular physician, MBC must indicate the number of physicians practicing in the same specialty; the number and date of each settlement suffered by the physician at issue; and whether each settlement is below average, average, or above average for that specialty during the most recent ten-year period.²⁶³

(3) When it discloses civil settlements, the Board is required to attach a lengthy disclaimer mandated in section 803.1(c).

Although SB 1950 came in response to vocal public outcry over the Board's prior public disclosure policy which had permitted the disclosure of no civil settlements whatsoever,²⁶⁴ and although MBC itself unanimously voted to support public disclosure of all settlements over \$30,000 in May 2002, SB 1950's complex formulation has not yielded much additional disclosure. Since the bill's effective date of January 1, 2003 to August 10, 2005, the settlements of only eleven physicians are being disclosed on MBC's Web site. In Recommendation #49, the Monitor suggested that MBC be required to disclose on its Web site all medical malpractice settlements over \$30,000 with the disclaimer currently required in section 803.1(c). Rather than reviving this controversial issue so soon after SB 1950 was enacted, Senator Figueroa opted to delegate it to the neutral Little Hoover Commission through new Business and Professions Code section 2026 (see above).

3. MBC is not authorized to disclose misdemeanor criminal convictions that are substantially related to the qualifications, functions, and duties of a physician.

In the *Initial Report*, the Monitor noted that, while MBC discloses felony criminal convictions against physicians for an indefinite period, it discloses no misdemeanor criminal convictions regardless of their number or seriousness — including misdemeanor convictions that were originally charged as straight felonies and/or “wobblers”²⁶⁵ but were pled down to

²⁶³ Bus. & Prof. Code § 803.1(b)(2)(B).

²⁶⁴ See *Initial Report*, *supra* note 13, at 48–53, 207, 215–16.

²⁶⁵ A “wobbler” is a crime that may be charged as either a felony or misdemeanor based on the facts of the case and in the discretion of a public prosecutor. See Penal Code § 17.

misdeemeanors. In Recommendation #50, the Monitor echoed the Joint Legislative Sunset Review Committee, the Medical Board, and the Federation of State Medical Boards in calling for the required disclosure of misdemeanor criminal convictions that are substantially related to the qualifications, duties, and functions of a physician.

Section 11 of SB 231 adds section 2027(a)(7) to the Business and Professions Code, which requires MBC to post on its Web site all substantially related misdemeanor criminal convictions against physicians for ten years from the date of the conviction. This new disclosure requirement is not effective until MBC presents to the Legislature, and the Legislature enacts, a list of misdemeanor convictions that are “substantially related.” Thus, additional legislation is required, but MBC will soon be permitted to disclose additional criminal convictions that are relevant to consumers when choosing health care providers.

4. MBC is not disclosing all significant terms and conditions of probation on its Web site.

In the *Initial Report*, the Monitor noted that, although required by sections 803.1 and 2027 to post on its Web site information about “revocations, suspensions, probations, or limitations on practice ordered by the board, including those made part of a probationary order or stipulated agreement,” MBC was not consistently disclosing all significant terms and conditions of public probation orders on the Internet — including restrictions on practice or prescribing, a requirement to have a third-party chaperone present when examining or treating patients, and requirements to participate in the Board’s Diversion Program and to abstain from the use of controlled substances and/or alcohol. In Recommendation #51, the Monitor urged MBC to disclose all significant terms and conditions of public probation orders on its Web site.

MBC has responded positively to this recommendation. Beginning in November 2004, MBC added a new “enforcement public document search” feature to its Web site. The Board has posted almost 500 enforcement-related documents — including accusations, disciplinary decisions (including stipulations), public letters of reprimand, and citations — from September 2004 forward. These documents are now available in their entirety on MBC’s Web site. As additional resources and staffing become available, MBC will attempt to backload all public enforcement-related documents on its Web site; in the meantime, they are available upon request.

B. Recommendations for the Future

■ ***Disclosable misdemeanor criminal convictions.*** MBC and HQE should establish a task force to develop the list of disclosable misdemeanor criminal convictions required by section 2027(d).